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51 Am. J. Juris. 65-105 (2006)

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Natural Law Lecture 2006

NATURAL JUSTICE*

LAWRENCE B. SOLUM

I. INTRODUCTION: NATURAL JUSTICE IN CONTEXT

Let me start with the heart of the matter. Justice is a natural virtue. Well-functioning humans are just, as are well-ordered human societies. Roughly, this means that in a well-ordered society, just humans internalize the laws and social norms (the *nomoi*)—they internalize lawfulness as a disposition that guides the way they relate to other humans. In societies that are mostly well-ordered, with isolated zones of substantial dysfunction, the *nomoi* are limited to those norms that are not clearly inconsistent with the function of law—to create the conditions for human flourishing. In a radically dysfunctional society, humans are thrown back on their own resources—doing the best they can in circumstances that may require great practical wisdom to avoid evil and achieve good. Justice is naturally good for humans—it is part and partial of human flourishing. All of these are natural ethical facts.

Those are the central claims of this Essay, but before we examine them, some context is required. The title, “Natural Justice,” may be enigmatic and even puzzling to many readers. Such puzzlement could have many sources—a general skepticism about naturalist approaches to morality, a more particular skepticism about a naturalistic approach to justice, or even a radical skepticism about the very idea of human nature itself. In this introduction, I shall not attempt to apply salve to these skeptical itches. Instead, my aim is to provide a sufficient context so that the argument for natural justice that is the main focus of the essay becomes intelligible.

A variety of approaches to morality, justice, and law could be called “naturalist” and the phrase “natural justice” could have a variety of meanings. The sense in which this essay uses the phrase “natural justice” is related to

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what might be called “moral naturalism.” Abstractly, moral naturalism is simply the view that moral facts are natural facts—they are not “supernatural” or “transcendent” or “queer” in Mackie’s wonderfully contentious expression.¹ Moral naturalism, if it can be sustained, is attractive for a number of well-known reasons. It enables realism about morality while avoiding the metaphysical embarrassment of queer entities, and it suggests that moral knowledge could be understood on the model of knowledge of the natural world. More colloquially, moral naturalism captures the essence of common-sense morality—that good and evil, right and wrong, are real features of the natural world that human reason can comprehend.

Debates about moral naturalism are well known to contemporary moral philosophers and especially to those immersed in contemporary metaethics, but these debates have not been at the center of contemporary philosophy of law and they are virtually unknown to those who practice normative legal theory from perspectives that are not informed by contemporary academic philosophy—those trained in economics, political science, or law itself. This puts us in an awkward position. Tracing even the broad outlines of the contemporary debates about the metaethics of moral naturalism will take us too far afield, but saying nothing at all will leave many readers with the feeling that “natural justice” is completely implausible. My strategy will be to provide a very brief introduction to some of the general worries about moral naturalism and to sketch the broad outlines of some of the answers to these worries. My hope is that skeptical readers will come to see that debates about moral naturalism are far from settled and that the case for naturalism in ethics is far stronger than they may have assumed.

Outside the community of moral philosophers, two distinct objections to moral naturalism are likely to be run together and confused with something else, the “fact-value distinction.” One of the objections is based on Hume’s discussion of the derivation of an “ought” from an “is” and the other based on G.E. Moore’s open-question argument. Let’s begin with Hume and then discuss Moore.

Here is the famous passage from Hume’s *A Treatise on Human Nature*:

I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, is, and is not, I meet with

1. J.L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin, 1977), ch. 1 sec. 9.

no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.²

What Hume meant in this paragraph is much debated, but one popular understanding is that Hume's argument established the "fact-value distinction," the existence of which entails that no normative conclusion can ever be derived from an argument with factual premises. Whatever Hume's argument does, it does not do this. For example, if we read Hume as making a claim about the logical form of normative arguments, his point might be that arguments from fact to value must include some premise that establishes the link—that is, an argument that has entirely nonnormative premises cannot establish a normative conclusion. This is not an argument against moral naturalism, because moral naturalism is a theory that supplies premises that establish a connection between natural facts and moral facts, or, to put it differently, moral naturalism just is the view that there are "natural ethical facts."³

The popular imagination frequently confuses Hume on "is and ought" with another famous philosophical argument—G.E. Moore's so-called "naturalistic fallacy," which hinges on his open-question argument.⁴ To appreciate the argument, we need a distinction, between "open questions" and "closed questions." We can say that it is a closed question whether bachelors are married men, if being an unmarried man is the meaning of being a bachelor. It simply doesn't make sense to say, "Yes, I know that Ben is a bachelor, but is he married?" The answer must be "no"; this question is closed; asking it suggests that the person who asks is confused about the meaning of the term "bachelor." On the other hand, the question whether bachelors are over 40 is an open one. It does make sense to ask, "Yes, I know that Ben is still a bachelor, but is he over 40 yet?" From the fact that Ben is a bachelor, it does not follow that he is (or is not) over 40.

2. David Hume, *A Treatise on Human Nature*, ed. David Norton and Mary Fate Norton (Oxford: Clarendon Press, 2000), bk. 3, ch. 1, sec. 1, para. 27.

3. See William D. Casebeer, *Natural Ethical Facts* (Cambridge, MA: MIT Press, 2003).

4. G.E. Moore, *Principia Ethica*, rev. ed. (Cambridge: Cambridge University Press 1993), 62-69.

As applied to moral naturalism, the open question argument takes the following form. If someone asserts that the meaning of “x is good” is the same as the meaning of “x is N,” where N is some natural property, we can sensibly ask the question, but is N good? Thus, if someone asserts that “x is good” if and only if “x is pleasurable,” we can reply, “Yes, I understand that x is pleasurable, but is it good?” The question “is it good?” is, according to Moore, an open question, and from the fact that it is open, we can infer that goodness is not the same as pleasure. And therefore, to equate the nonnatural property “good” with the natural property “pleasurable” is to commit the naturalistic fallacy.

The debate over Moore’s argument is almost endlessly complex, but it is possible to give an example of how the debate goes that will show that Moore’s argument may have started a conversation but it cannot be reasonable have said to be a conversation stopper. Moore’s argument is based on the idea that an assertion that “x is good” if and only if “x is pleasurable” is a claim about meaning. What Moore seems not to have noticed is that “goodness” and “pleasure” might denote the same property, but not mean the same thing. This possibility is famously illustrated with the example of “water” and H₂O. We can agree that all water is H₂O, but, at the same time, believe that the meaning of “water” is different than the meaning of “H₂O.” We know this is true, because chemists had to discover that water was H₂O—prior to the discovery, the relationship of water to the elements, hydrogen and oxygen was unknown or imperfectly understood. But it is not just the case that being water and being H₂O are merely coincident properties, as being a member of the Illinois philosophy department and not having grown up in Japan are merely coincident. Water is H₂O. It was an open question whether water was H₂O at one time, but this did not preclude the possibility that water just was H₂O.

A much better version of this reply to Moore is famously associated with David Brink,⁵ and there is much more to be said with replies and further arguments.⁶ (Whole volumes, in fact.) The point of the argument is that Moore’s open-question argument hinges on the assumption that for a moral property to be identical to a natural property, the meaning of two concepts must be identical—and that assumption, the argument purports to show, is false. This argument is embedded in a larger philosophical controversy—about the role of conceptual analysis and the analytic-synthetic distinction, but

5. See David Brink, *Moral Realism and the Foundations of Ethics* (Cambridge: Cambridge University Press, 1989).

6. Terence Hogan and Mark Timmons, “Troubles for New Wave Moral Semantics: The Open-Question Argument Revisited,” *Philosophical Review* 21 (1992) 153.

for my purpose, the only claim that you need to accept is that it is an “open question” whether the open-question argument defeats moral naturalism.

Having said this much, I want now to step back from philosophy and turn to culture. The three ideas that I have been discussing—(1) the fact-value distinction, (2) deriving ought from is, and (3) the open-question argument—play a role in contemporary intellectual culture. Most college students encounter some version of the fact-value distinction, especially if they have even a smattering of liberal arts education. The version of the distinction that holds sway in the popular cultural is not, I would submit, either Hume’s point about the logical structure of arguments that move from “is” premises to “ought” conclusions or Moore’s open-question argument. Rather, in the popular culture, the idea is that factual beliefs are, in principle, demonstrably true or false, whereas moral beliefs are neither true nor false, but simply matters of opinion and culture or the products of relations of power and subordination. That is, the fact-value distinction that holds sway in the popular imagination is tied to philosophically naïve versions of moral relativism, sometimes infused with a smattering of dimly comprehended noncognitivist metaethics.⁷

What I have said so far is not intended to convince you that moral naturalism is the correct view in metaethics—the arguments for that conclusion would take a monograph (or several) and could not even be meaningfully mentioned or described in a few pages. Rather, what I hope to have done is to challenge the preconceptions and prejudices of those who find moral naturalism to be wholly implausible or to be based on an obvious fallacy. Moral naturalism may ultimately be incorrect, but if this is so, it is not because the proponents of moral naturalism commit a naïve philosophical mistake. Quite the contrary, the naïve philosophical mistakes are to assume a metaethically potent fact-value distinction is self evident or to assume that Hume and Moore produced knock-down arguments that demonstrate against the view that there are natural ethical facts. Those assumptions are quite simply wrong.

II. FROM VIRTUE ETHICS TO VIRTUE JURISPRUDENCE

Moral naturalism isn’t a single theory—it is a family of views. Only one of these (which we might call “virtue ethics” or more precisely “neo-Aristotelian virtue ethics”) will play a role in the argument for natural justice.

7. Something similar to the popular view may once have had philosophical currency. See A.J. Ayer, *Language, Truth, and Logic* (London: Victor Gollantz, 1946), ch. VI; and Charles L. Stevenson, *Ethics and Language* (New Haven, CT: Yale University Press, 1944).

What is “virtue ethics” and how does it relate to natural justice? The answer to those questions can be described as the movement from virtue ethics to virtue jurisprudence.

A. *Virtue Ethics*

Let’s begin with “virtue ethics.” This phrase describes an approach in contemporary moral philosophy, but the best way to explicate the contemporary theory is to excavate its foundations.

1. Aristotelian Foundations

Contemporary virtue ethics has deep roots—in the western philosophical tradition and elsewhere. In the west, virtue ethics might be said to originate with Plato and Aristotle and the aretaic tradition includes the Stoics and Thomists. Indeed, as Julia Annas puts it: “In the tradition of Western philosophy since the fifth century B.C., the default form of ethical theory has been some version of what is nowadays called virtue ethics; real theoretical alternatives emerge only with Kant and with consequentialism.”⁸ As Rosalind Hursthouse has written, “[Virtue ethics] suffered a momentary eclipse during the nineteenth century but re-emerged in the late 1950’s in Anglo-American philosophy. It was heralded by Anscombe’s famous article “Modern Moral Philosophy” . . . which crystallised an increasing dissatisfaction with the forms of deontology and utilitarianism then prevailing.”⁹ A variety of modern philosophers—including Kant and Hume—have important things to say about virtue as well. Although contemporary virtue ethics draws mostly on ideas and arguments from the western philosophical tradition, traditional Chinese philosophy, especially Confucian ethics, might also be characterized as a form of virtue ethics.

Although virtue ethics has many different roots, reaching into a variety of intellectual traditions, Aristotle’s moral philosophy has played a key role in the development of aretaic moral philosophy and serves as a model for important contemporary versions of virtue ethics. For these reasons, Aristotle’s moral theory provides an excellent starting point for an investigation of virtue ethics. Of course, even a brief exposition of Aristotle’s moral theory is outside the

8. Julia Annas, “Virtue Ethics” in *The Oxford Handbook of Ethical Theory*, ed. David Copp (Oxford: Oxford University Press, 2005), 515.

9. Rosalind Hursthouse, “Virtue Ethics,” *The Stanford Encyclopedia of Philosophy* (Fall 2003 Edition), ed. Edward N. Zalta, URL <http://plato.stanford.edu/archives/fall2003/entries/ethics-virtue/> (visited April 6, 2006).

scope of this article; nonetheless, we can explore the broad outlines of his views and introduce the key terms in his conceptual vocabulary.¹⁰

One place to start a survey of Aristotle's ethics is with Aristotle's investigation of the questions, "What ends or goals are most choice-worthy for humans?" Or "What is the highest humanly achievable good?" The answer to these questions, Aristotle argued, will possess three characteristics: first, the highest good will be desirable for itself, second, it will not be desirable for the sake of some other end, and third, every other good will be desirable for its sake. The human good that meets these three criteria is *eudaimonia*¹¹—translated imperfectly as "happiness." It is important at the outset to distinguish the concept of *eudaimonia* from modern interpretations of the idea of happiness. *Eudaimonia* is not a pleasurable feeling or sense of well being—that is, it is not merely a desirable psychological state. Rather, it is *eu zên* or "living well."

That happiness is good in itself seems obvious—the danger is not that happiness lacks intrinsic good, but rather that this conclusion is a mere tautology or hopelessly vague. Similarly, it seems clear that happiness is not pursued for instrumental reasons. Try completing the sentence, "I want to be happy in order to . . ." No other good seems appropriate as the further end for which the sake of which happiness is pursued. Finally, Aristotle argues that every other human end—wealth, health, and other resources—is pursued for the sake of happiness. I will not recapitulate Aristotle's argument for these conclusions here, but I do claim that Aristotle's position on the status of happiness is intuitively plausible and consistent with widely shared beliefs or intuitions.

If Aristotle's views about the choiceworthiness of happiness are intuitively plausible but abstract, his views about the nature of happiness are both more concrete and contestable. Aristotle develops his conception of happiness with one of the most famous arguments in all of moral philosophy—the function argument. That is, Aristotle answers the question, "What is happiness?" by posing another question, "What is the function (*ergon*) of a human being?" He argues that the characteristic function of humans is rational activity in accordance with the human excellences (or virtues).¹² So happiness consists

10. See generally Richard Kraut, "Aristotle's Ethics," *The Stanford Encyclopedia of Philosophy* (Summer 2005 Edition), ed. Edward N. Zalta, URL <http://plato.stanford.edu/archives/sum2005/entries/aristotle-ethics/> (visited April 6, 2006).

11. *Eudaimonia* has two parts. The first, *eu*, means "well" and the second, *daimon*, means "divinity" or "spirit." See Henry George Liddell and Robert Scott, *Greek-English Lexicon*, 9th ed. Henry Stuart Jones (Oxford: Oxford University Press, 1996). Literally, *eudaimonia* is living a life favored by the gods.

12. *Nicomachean Ethics* (hereafter, *NE*), 1097b22-1098a20. Citations refer to the standard Bekker pagination.

in “using reason well over the course of a full life” Why “using reason”? Because humans are rational beings; rationality is part of human nature and it is what makes us distinctively human. Why “in accordance with the human excellences”? Because, in general, doing something well requires the appropriate excellences or virtues; hence doing human things well requires the human excellences. Why “over the course of a full life”? Because human lives can be spoiled by unredeemed tragedy; the appropriate vantage point for judging the happiness of a human life is from the end, looking backwards over the whole.

In order to live a happy life, however, the virtues are necessary but not sufficient conditions. Other goods are required to enable a life of excellent rational activity. Misfortune (a terrible accident) or extreme poverty (a lack of resources) can prevent humans from realizing their potential for living a life of rational activity in accord with the virtues. A life of exhausting physical toil and drudgery unrelieved by periods that offer the opportunity for higher pursuits does not offer opportunities for virtuous rational activity and hence cannot be a happy life.

The next question, then, is “What are the human excellences?” Aristotle contends that the virtues can be divided into two types, intellectual and moral.¹³ The intellectual virtues are excellences of mind or intellect—what Aristotle calls the rational part of the soul; the moral virtues pertain to character and emotion—the part of the soul that cannot itself reason but is nonetheless capable of following reason.

There are two intellectual virtues.¹⁴ The first is theoretical wisdom or *sophia*—think of the kind of excellence characteristic of a theoretical physicist, logician, or mathematician. The second intellectual virtue is practical wisdom or *phronesis*—think of the quality that we describe as “good judgment” or “common sense.”¹⁵ Aristotle offers a long (and nonexhaustive list) of moral virtues—these include characteristics such as courage, temperance, and so on. He believed that each of the moral virtues was a mean with respect to a morally neutral emotion—although at least one of the moral virtues—justice—does not easily fit this pattern.

“A mean with respect to a morally neutral emotion”—that’s quite a mouthful. We can unpack Aristotle’s claim by looking at each of the component ideas in the context of an example. Let’s use the virtue of courage—but you should be forewarned that this may be the best and cleanest example for Aristotle. The emotion that is associated with courage is “fear.” When

13. *NE*, 1103a1-10.

14. Aristotle may have included scientific knowledge (*episteme*) and art (*techne*) in his list of intellectual virtues. *NE*, 1139b1.

15. *NE*, 1139a3-8.

Aristotle says that courage is a “mean” with respect to fear, he points to the relationship between fear and two opposing vices—which we might call cowardice and rashness. Cowardice is the vice that is associated with a disposition to excessive fear; humans with this vice will characteristically overreact to danger. Rashness is the vice with a disposition to insufficient fear; humans with this vice will characteristically be insufficiently alert to and evasive of various risks. Courage is the disposition to fear that is proportionate to the situation, neither too much nor too little but rather the mean that lies between excess and deficiency. Another point has been implicit in the discussion so far—the moral virtues are dispositions and not states. There is no particular amount of fear that is virtuous; the virtue of courage is the disposition to fear that is appropriate to the situation.

One more idea is important to Aristotle’s understandings of the virtues. For Aristotle it is not sufficient that one’s behavior is in accord with the virtues. Rather, the virtuous agent acts on the basis of the virtues. The virtuous agent acts in conformity with courage and does the courageous act because it is courageous. But this does not mean that the virtuous agent must strain or act contrary to her emotions when she acts courageously. For the virtuous agent, virtuous action comes naturally—it does not require strength of will to overcome natural impulses to the contrary. For the fully virtuous agent, reason, emotion, and desire work together in harmony—they are not at war.¹⁶

I’ve barely skimmed the surface of Aristotle’s ethics, but before I turn to contemporary virtue ethics, I want to make one more point. One of Aristotle’s most important claims is that there is no decision procedure for ethics.¹⁷ This claim marks a divide between Aristotle and modern moral philosophers, such as Kant and Bentham—at least on some interpretations of modern deontology and consequentialism. The categorical imperative and the utilitarian calculus do aim to provide decision procedures for making moral judgments: “Act so as to maximize utility!” or “Act so that the maxim of your action could be willed as universal law of nature!”—both of these formulas attempt to provide a method for acting in conformity with the requirements of morality. Here is Richard Kraut’s clear and elegant description of Aristotle’s position:

So far from offering a decision procedure, Aristotle insists that this is something that no ethical theory can do. His theory elucidates the nature of virtue, but what must be done on any particular occasion by a virtuous agent depends on the circumstances, and these vary so much from one occasion to another that there

16. See Annas, *supra*, note 8.

17. Cf. John Rawls, “Outline of a Decision Procedure for Ethics,” *Philosophical Review* 60 (1951) 177-197, reprinted in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 1-19.

is no possibility of stating a series of rules, however complicated, that collectively solve every practical problem. This feature of ethical theory is not unique; Aristotle thinks it applies to many crafts, such as medicine and navigation (1104a7-10). He says that the virtuous person “sees the truth in each case, being as it were a standard and measure of them” (1113a32-3); but this appeal to the good person’s vision should not be taken to mean that he has an inarticulate and incommunicable insight into the truth. Aristotle thinks of the good person as someone who is good at deliberation, and he describes deliberation as a process of rational inquiry. The intermediate point that the good person tries to find is “determined by logos (“reason,” “account”) and in the way that the person of practical reason would determine it” (1107a1-2). To say that such a person “sees” what to do is simply a way of registering the point that the good person’s reasoning does succeed in discovering what is best in each situation. He is “as it were a standard and measure” in the sense that his views should be regarded as authoritative by other members of the community. A standard or measure is something that settles disputes; and because good people are so skilled at discovering the mean in difficult cases, their advice must be sought and heeded.¹⁸

With this final point in place, let’s turn from Aristotle’s ethical theory to contemporary virtue ethics.

2. Contemporary Virtue Ethics

Aristotle viewed his ethical theory as continuous in an important way with his biology. Just as a biologist might ask what are the characteristics of a well-functioning antelope or lion, so Aristotle’s ethics can be seen as asking the question, “What are the characteristics of a well functioning human?” And his politics extends this question to, “What are the characteristics of a well functioning community of humans?” Aristotle’s naturalism poses many questions for our assessment of his theory, but one of those questions is this: since we now reject much of what Aristotle had to say about human biology and psychology, doesn’t this undermine his account of the virtues? I am not going to answer that question, because contemporary virtue ethics provides a way for the project of virtue jurisprudence to avoid it. In a sense, the point of contemporary virtue ethics is to ground our understanding of the virtues in contemporary biology and psychology. Here is how Julia Annas explains this idea:

Contemporary virtue ethics with the ambitions of the classical theories, of which the most powerful example is that of Hursthouse, does in contemporary terms what the classical theories do in theirs. It looks at human nature as we find

18. Kraut, *supra* note 10.

out about that from the best contemporary science. Here the relevant sciences are biology, ethnology and psychology, studies of humans and other animals as parts of the life on our planet. When we look at other species it has long been clear that we can discern patterns of flourishing particular to the species. There has been reluctance to extend this to humans, on the grounds that we, unlike other animals, can choose and create different patterns of living, and evaluate them, sometimes rejecting and changing them as a result. It is only recently that it has been realized that this is not a reason for rejecting naturalism. For this fact about our species is, precisely, a fact about our species. It is because we are rational beings that we can create and evaluate different ways of living, rather than carrying on in the set patterns that members of other species follow. And this is a fact about us of the same sort as the facts about other species on the basis of which we study them. Human rationality is not something which cuts us off from the rest of the biological universe; it is just what is most distinctive about us as a species. If we take this point seriously, then a naturalistic account of humans needs to come up with patterns of flourishing as we do for other species, but specific to humans, thus taking account of the way that our life patterns are dominated by the fact that we are rational beings. Virtue theory takes advantage of the fact that human rationality has been the subject of scientific study by psychologists for quite some time now, though it has only recently been recognized that it is this, rather than some outdated Aristotelian ideas, which form the basis of a naturalistic support for virtue theory.¹⁹

In other words, one important agenda of contemporary virtue ethics is to develop an account of the virtues that is consistent with modern science. And this grounding may entail some important divergence between contemporary theories and Aristotle's account.

Contemporary virtue ethics takes on a variety of forms. Because the contemporary forms of virtue ethics are relatively new by comparison with modern moral philosophies (consequentialism, deontology) and with ancient virtue ethics, these theories are still at a relatively early stage of development. Indeed, one gap in contemporary virtue ethics is the lack of a comprehensive treatment of the virtue of justice—a topic that this Article addresses in some depth. There are many prominent variants of contemporary virtue ethics. On this occasion, I will not attempt a survey, but I will venture a short list. Philippa Foot and Rosalind Hursthouse have both offered neoaristotelian variants of virtue ethics—although Foot does not see her own work as belonging to “virtue ethics.” Lawrence Becker has developed a neostoic virtue ethics,²⁰ and Michael Slote a neohumean variant.²¹ In this essay, I will use

19. Annas, *supra*, note 8.

20. See Lawrence Becker, *A New Stoicism* (Princeton, NJ: Princeton University Press, 1998).

21. See Michael Slote, *Morals from Motives* (Oxford: Oxford University Press 2003); Michael Slote, *From Morality to Virtue* (Oxford: Oxford University Press 1992).

Hursthouse's version of contemporary virtue ethics as a model: Solumonic virtue jurisprudence is decidedly Hursthousian.

B. Virtue Jurisprudence

Virtue ethics makes the aretaic turn²² in moral philosophy. The analogous move in political theory might be called "virtue politics."²³ In normative legal theory, the corresponding theory can be called "virtue jurisprudence."²⁴ A complete virtue jurisprudence would include a virtue-theoretic account of the ends of legislation, a virtue-centered theory of judging, and an aretaic account of the nature of law. In this Article, the focus on the inquiry is on a single virtue—the virtue of justice—and a particular question concerning that virtue—is "justice" a "natural virtue"? But that inquiry is pursued in the context of virtue jurisprudence, and for that reason, a brief introduction to the larger project is required. On this occasion, I shall focus on the portion of virtue jurisprudence that is most developed—the theory of judging.

1. An Aretaic Theory of Judging

Virtue jurisprudence can be approached from several different angles, but one place to begin is with the theory of judging. The core of an aretaic approach to judging is a theory of the judicial virtues and vices. We can begin there and then provide a more abstract and theoretical formulation of the theory.

a) A Short List of the Judicial Virtues

Let's start with a list. My list will be short—it will emphasize judicial virtues that are either noncontroversial or theoretically important. We can start with the former and then proceed to the latter.

22. See "Aretaic Turn," *Wikipedia*, http://en.wikipedia.org/wiki/Aretaic_turn (visited April 6, 2006); see also Lawrence B. Solum, "The Aretaic Turn in Constitutional Theory," *Brooklyn Law Review* 70 (2005) 475.

23. See Rosalind Hursthouse, "Virtue Ethics," *supra*, note 9 ("Whether virtue ethics can be expected to grow into "virtue politics"—i.e. to extend from moral philosophy into political philosophy—is not so clear. Although Plato and Aristotle can be great inspirations as far as the former is concerned, neither, on the face of it, are attractive sources of insight where politics is concerned.").

24. See "Virtue Jurisprudence," *Wikipedia*, http://en.wikipedia.org/wiki/Virtue_jurisprudence (visited April 6, 2006).

(1) Judicial Incorruptibility and Judicial Sobriety

One judicial vice on which there is likely to be near universal agreement is “corruption.” Judges who sell their votes undermine the substantive goals of the law, because corrupt decisions are at least as likely to be wrong as they are to be substantively correct. Moreover, corrupt decisions undermine the rule of law values of productivity and uniformity of legal decisions and likewise undermine public respect for the law and public acceptance of the law as legitimate.

If we accept the conclusion that judicial corruption is a vice, then what is the corresponding virtue? This question could become complex—because there are a variety of character flaws that might lead to corruption. One such flaw, greed (or *pleonexia*), may be an underlying cause of corruption—because a desire for more than one’s share (or entitlement) could lead a judge to accept bribes. All humans are at risk of mistaking wealth (which can only be a means) for a final end (something worth pursuing for its own sake). Some judges may resent the fact that they receive compensation that is sometimes only a fraction of that provided their peers in private legal practice—some of whom may be less talented.

We do not need to identify all of the possible vices that could lead to corruption in order to see that *incorruptibility* is an uncontested judicial virtue. There is no real controversy over the proposition that judges should be disposed to resist the temptations that lead to corruption. We call this disposition the “judicial virtue of incorruptibility,” even if it turns out that this virtue encompasses a variety of particular virtues each of which corresponds to a particular human vice that could lead to corruption.

There is another vice that is closely related to corruption but is distinct from greed. Judges can become corrupted because their desires are not in order—because they crave pleasure or the status (and corresponding envy) conferred by the possession of fine things. Judges, like the rest of us, can be corrupted by a taste for designer shoes, fast cars, loose companions, or intoxicating substances. More subtly, a judge could be corrupted by a desire for the finer things of life, for example, a magnificent home, the ability to confer lavish gifts upon one’s children, or the opportunity for luxurious travel.

Let us use some old fashioned terminology and call the vice of disorderly desire “intemperance”—recognizing that modern ears may not be able to hear that word without summoning up an image of drunkenness caused by a craving for the pleasures of strong drink. Can a case be made that intemperance is not a judicial vice? One might argue that intemperance is a purely private vice—that a judge’s preference for a third cosmopolitan, the latest from Jimmy Choo or Manolo Blahnik, or the company of good looking youthful companions is

her own business and hence irrelevant to the question whether she is an excellent judge. Of course, a proportionate and well-ordered desire for such things is simply not a vice—or at least not an *uncontested* vice.²⁵ But a disposition to disproportionate desires for such pleasures can lead to more than corruption. Most obviously, a judge who is intoxicated (or high) on the bench is likely to be prone to error, for obvious reasons. The inordinate pursuit of less intoxicating pleasures can also impair judicial performance—by focusing the judge’s attention and energy away from judicial tasks and tempting the judge to use her power in ways that facilitate her pleasures.

There is a counter argument. It is a common human experience to have a friend, colleague, or acquaintance whose desires are disordered, but nonetheless “gets the job done”—even performs brilliantly at times. Who hasn’t encountered the lawyer who is a star by day, but a lush or gambler in the wee hours, or the friend whose life at work still holds together despite a drug problem? So, the argument goes, intemperance is not a *judicial vice*—at least not until it interferes with the performance of judicial duty. Even if the intemperate judicial candidate is a disaster at home, her intemperance should not disqualify her from judicial office if she performs at the office.

This counter-argument is ultimately unpersuasive. Of course, an intemperate judge can get lucky and “get away with it,” either appearing to do well or even actually doing well despite disordered desires. But in such cases “getting away with it” is a matter of luck; an intemperate judge is simply not reliable. A really damaging misstep is always just one cosmopolitan away.

The virtue that corresponds to the vice of intemperance could be called *temperance*, in the classical sense that encompasses the ordering of all the natural desires. But I propose that we use another term to refer to the judicial form of temperance. We have a saying that captures the intuitive sense that judges must have their desires in order: we say of a temperate human that she or he is “sober as a judge,” and this suggests that we name this virtue “judicial sobriety.”

(2) Judicial Courage

Fear is one of the most powerful and familiar of the emotions. For Aristotle, the virtue of courage relates to the morally neutral emotion of fear. Following the pattern of the moral virtues, courage represents a mean between a vice of excess—cowardice—and a vice of deficiency, which we might call

25. One might believe that a desire for strong drink, flashy clothes, or younger companions reflects bad taste without believing that such desires are contrary to virtue.

“rashness” or “recklessness.” We can agree that cowardice is a judicial vice, and judicial courage is a virtue.

We might usefully subdivide the virtue courage into two parts—which I shall call “physical courage” and “civic courage.” That judges need physical courage in order to be excellent *as judges* is a lamentable fact in many societies. We have been reminded of this fact recently by the tragic experiences of federal district judge, Joan Lefkow, who was threatened by one defendant and whose husband and mother were murdered by a party to another case.²⁶ A judge who could be intimidated by threats of physical violence could not reliably do justice in our society—much less under conditions where violence (or threats of violence) was even more prevalent—as may be the case where narcoterrorism or violent ethnic conflict is pervasive.

Judicial courage has a second dimension. Judges, like most humans, care about their reputations and social standing. Like the rest of us, judges seek the approval and companionship of their fellows. So in addition to physical danger, judges may fear consequences of their actions that involve threats to status and social approval. This is because the law may require judges to make unpopular decisions. A judge who ordered school integration in the South might be shunned socially. In societies where the judicial branch wields significant power in cases involving hot button issues (abortion, end of life disputes, and so forth), there will be occasions where doing what the law requires may be profoundly unpopular. For this reason, judges need the virtue of civic courage—the disposition to put the regard of one’s fellows in proper place and to take it into account in the right way on the right occasions for the right reasons. A judge with this virtue will not be tempted to sacrifice justice on the altar of public opinion. A civically courageous judge understands that the good opinion of others is worth having if it flows from having done justice and that social approval for injustice is an impermissible motive for judicial action.

(3) Judicial Temperament and Impartiality

Like fear, anger is an emotion both familiar and powerful.²⁷ Judges like the rest of us may be hot tempered or cool and collected. And like the rest of us,

26. Susan Estrich, “Now Is a Tough Time To Be a Judge,” *The Sun News*, March 25, 2005, <http://www.myrtlebeachonline.com/mld/sunnews/news/opinion/11226003.htm> (stating “everyone was shaken up by what happened to the Lefkow family in Chicago, the cold-blooded murder of a judge’s husband and aged mother.”).

27. My view of the virtue of temperance has been improved by recent work by Nancy Sherman. See Nancy Sherman, *Stoic Warriors: The Ancient Philosophy Behind the Military Mind* (Oxford: Oxford University Press 2005).

judges are likely to find themselves in situations where a hot temper could produce intemperate actions. This is especially true of trial judges, who are given the task of maintaining order in what may become emotionally charged circumstances. Litigants may ignore judicial authority or act with disrespect. Some lawyers may deliberately attempt to provoke the judge in order to elicit legal mistakes or “on the record” behavior that displays animus towards a party and serve as the basis for an appeal. In the face of such provocations, a judge with an “anger management problem” may “fly off the handle.” Intemperate judicial behavior may lead the judge to misapply the law—misinterpreting the applicable legal standards in “the heat of anger.” Moreover, a hot-headed judge may become partial—pulling against the party who is the object of anger and displaying favoritism to that party’s opponent.

Aristotle identified *proates* or “good temper” as the corrective virtue for the vice of bad temper. In the judicial context, this virtue is so important that we have a phrase that expresses the virtue as a distinctively judicial form of excellence—“judicial temperament.” This phrase reflects our sense that the virtue of “good temper” is essential for good judging.

Is judicial temperament also required for judges who do not supervise trials? Appellate judges work in a cooler environment—provocative behavior by appellate lawyers is rare although not unknown. The parties to an appellate proceeding frequently do not appear, and if they do, they sit in the audience without any formal participation in the appellate process itself. Some appellate courts proceed almost entirely on the basis of the briefs, dispensing with oral argument and hence with the opportunity for “live and in person” provocations. Nonetheless, good temper is essential for excellence in appellate judging. Appellate judges hear cases in panels or en banc—creating opportunities for friction among the judges themselves. Hot tempers can destroy collegiality and with it the opportunity for compromise and mutual understanding. Moreover, even a brief can elicit anger, and if anger becomes rage, it can have a blinding effect, depriving the judge of the ability to recognize the merits of an argument or a weakness in the judge’s own conception of the legal issues in a case.

If excessive anger is a vice, then what about its opposite? Is there a vice of deficiency with respect to anger? The Stoics are famous for answering this question in the negative: we might say that for the Stoics, the disposition to feel any anger in any circumstances is a vice.²⁸ The contrary view is that

28. See Plutarch, “On the Control of Anger,” in *Moralia*, vol. 6, trans. W.C. Helmbold (Cambridge, MA: Harvard University Press/Loeb Classical Library, 1939); Seneca, “On Anger,” *Moral Essays*, vol. 1, trans. John W. Basore (Cambridge, MA: Harvard University Press/Loeb Classical Library, 1928).

proportionate anger serves a valuable function—alerting us to wrongs and motivating us to respond to them. A simple way of framing the issue is to ask which character from the 1960s television series *Star Trek* would make the best judge—Captain Kirk, Dr. McCoy, or Mr. Spock. Mr. Spock resembles the Stoic sage—he feels no anger and acts only on the basis of logic; we imagine Judge Spock reacting with equanimity to even the most severe courtroom provocations. Dr. McCoy is hot tempered; we imagine him flying off the handle in response to outrageous behavior by the lawyer for a greedy corporation. Captain Kirk represents a mean between these two extremes; we imagine Judge Kirk as appropriately outraged by bad behavior and injustice, but nonetheless remaining “in control,” angered by the right things and responding in an appropriate manner. The virtue of judicial temperament consists in having appropriate anger—anger for the right reasons on the right occasions with a clear understanding of the consequences of its expression.

More concretely, when a party flouts the law or disrespects the participants in a legal proceeding, anger may be appropriate. Such appropriate anger alerts the judge to the existence of a “situation that must be dealt with.” In some circumstances, the judge will properly display such anger, giving a lawyer, party, or witness “a stern warning.” When a lawyer, party, or witness persists in bad conduct, sanctions may be warranted; in such cases, an appropriate sanction is the right way to act on the basis of appropriate anger. But judges with the virtue of a judicial temperament will not display their anger by ruling against an offending party on issues that are close or exercising discretion on incidental matters so as to disfavor the anger-provoking party. Those actions would be motivated by an emotion that is properly felt, but would be expressed in an inappropriate manner—and the characteristic reason for inappropriate expression is disproportionate anger that prompts a “loss of control” and “clouding of judgment.”

One reason that the disposition to disproportionate anger is an especially dangerous vice for judges is that anger can produce bias. For this reason, the virtue of judicial temperament is closely related to another judicial virtue, “judicial impartiality.” This virtue is a familiar feature of our conception of good judging. We want judges to be neutral arbitrators. A judge should be open to the law and evidence and not biased in favor of one side or another. Such impartiality should extend not just to the parties but should also encompass the causes, movements, special interests, and ideologies that may be associated with those parties. When a judge takes the bench or lifts her pen to write an opinion, she should put aside her allegiance to left or right, liberal or conservative, religiosity or secularism.

It is a mistake, however, to view impartiality as synonymous with disinterest. The virtue of impartiality is not cold-blooded. This is because the

role of judge requires insight and understanding into the human condition. A good judge perceives the law and facts from a human perspective. Some facts are hot—charged with emotional salience. Some legal rules are righteous—engaging our sense of moral indignation when juxtaposed with violative behavior. So the impartial judge is not cold blooded; she is not *indifferent* to the parties that come before her. Rather, the judge with the virtue of judicial impartiality has even-handed sympathy for all the parties to a dispute. When we say, “Impartiality is not indifference,” we mean that the virtue of impartiality requires both sympathy and empathy without taking sides or favoring the legitimate interests of one side over those of the other.

(4) Diligence and Carefulness

Judging is hard work, involving its share of drudgery. Some trials are long and boring. Some opinions require long hours of research and even longer hours of careful drafting. The temptation to shirk this work is accentuated by the fact that judges are not (and should not be) closely supervised. And the lack of supervision is compounded in jurisdictions that grant judges life tenure or long terms in office. It is hard enough to remove a judge for outright corruption; one doubts that any American judge has been removed on the basis of sloth alone. But slothful or lazy judges can do real harm. They are tempted to delegate too much responsibility to judicial clerks, substituting the judgment of the clerk for the judge’s own intellectual engagement with the case. Another temptation is to shape one’s decision in order to minimize one’s own workload. If granting the summary judgment motion takes a case off one’s docket, the slothful judge might grant the motion for that reason alone, sacrificing justice on the altar of expediency.

What is the virtue that corresponds to the vice of sloth? We might call it diligence. The diligent judge has the right attitude towards judicial work, finding judicial tasks engaging and rewarding. But more than a good attitude is required. An excellent judge must have an appropriate “energy level”—a product of both physical and mental health. The combination of these traits should translate into a judge who is capable of hard work when hard work is required. Such a judge will put in the required hours and sweat out the difficult tasks. Such a judge will not hesitate to make the right decision, even if that makes more work for the judge. Nowadays, encouraging settlements may be an appropriate activity for judges, but a diligent judge will aim for just and efficient settlements and not for resolutions that serve the judge’s own convenience.

Carefulness is closely related to diligence. No one can sensibly doubt that judicial carelessness is a vice. Careless decisions, careless drafting, careless

research—any of these can lead to substantive injustice. Carefulness is especially important in the context of judging, because excellent judging frequently requires meticulous attention to details. The lazy judge may shirk the unpleasant task of mastering the structure of a complex statute or avoid the painstaking task of making sense of tangled body of precedent. Likewise, it requires diligence and care to draft an opinion in which each and every sentence is worded with careful appreciation of the importance of precision and accuracy. An excellent judge has an eye for detail and a devotion to precision.

(5) Judicial Intelligence and Learnedness

Can anyone doubt that stupidity is a judicial vice? All humans need intelligence to function well—but some tasks require more intelligence on more occasions. Judging is the kind of task that sometimes requires extraordinary intelligence. Both law and facts can be complex. Only a judge with intelligence will be able to sort out the complexities of the rule against perpetuities or penetrate the mysteries of a complex statute. But more than intelligence is required. A truly excellent judge must also be learned in the law, because one cannot start from scratch in each and every case and because there is at least some truth to the notion that the law is a seamless web. To put these same points the other way round: stupid and ignorant judges will be error prone, likely to misunderstand and misstate the law and unlikely to make findings of fact that are correct.

The need for judicial intelligence and learnedness is accentuated rather than diminished in an adversary system. It is true that good lawyering makes a judge's job easier; the lawyers can identify the relevant issues and call the judge's attention to the best arguments on each side of those issues that are in dispute. But in an adversary system, successful advocates will try to make "worse case appear the better," by deploying sophistry and rhetoric. Intelligent and learned judges can "see through" the obfuscation and look past the appeals to prejudice and preconception.

(6) Craft and Skill

So far, our investigation has focused on what Aristotle called the moral and intellectual virtues. These are dispositions of character and mind that make for human excellence. Good judging requires more than good character and intellectual ability. That is because judging includes elements of craft, and therefore a good judge must possess a skill set—the particular learned abilities that are to good judging what good bowling technique is to archery or good

draftsmanship is to architecture. A full account of judicial craft is far beyond the scope of this essay, but one particular aspect of judicial craft and skill cries out for attention. Excellence in judging (especially good appellate judging) requires particular skill in the use of language. Good judges must be good communicators. This aspect of judicial skill includes at least two parts—oral and written. It is obvious that trial judges need good oral communication skills; they must deliver a variety of oral instructions to the various participants in both trial and pre-trial proceedings. Among these, jury instructions are particularly important. Written communication skills are especially important for appellate judges in a common law system, because of the doctrine of *stare decisis*. Because appellate opinions set precedent, a badly written opinion can misstate the law or state the law in a misleading way. A really well drafted opinion, on the other hand, can clarify the obscure and illuminate the meaning of murky legal texts.

Good communication skills are also important to judges when they mediate between the parties to a dispute. A skilled judge can gain the trust and cooperation of the parties—resorting to the threat of sanctions only in those rare cases when force is truly necessary. In this way, good communication skills can increase the efficiency of judicial proceedings, allowing the judge to focus her attention on those issues and cases where settlement and cooperative processes are unavailing.

(7) Practical Wisdom or Phronesis

The final virtue of my short list is the corrective for bad judgment or foolishness. I shall use the phrase “judicial wisdom” to refer to a judge’s possession of the virtue of *phronesis* or practical wisdom: the good judge must possess practical wisdom in the choosing of legal ends and means. Practical wisdom is the virtue that enables one to make good choices in particular circumstances. The person of practical wisdom knows which particular ends are worth pursuing and knows which means are best suited to achieve those ends. Judicial wisdom is simply the virtue of practical wisdom as applied to the choices that must be made by judges. The practically wise judge has developed excellence in knowing what goals to pursue in the particular case and excellence in choosing the means to accomplish those goals. In the literature of legal theory, Karl Llewellyn’s notion of “situation sense” captures much of the content of the notion that judicial wisdom corresponds to the intellectual virtue of *phronesis*.

This abstract account of judicial wisdom can be made more concrete by considering the contrast between practical wisdom and theoretical wisdom in the judicial context. The judge who possesses theoretical wisdom is the master

of legal theory, with the ability to engage in sophisticated legal reasoning and insight into subtle connections in legal doctrine. But a judge who possesses judicial intelligence is still not necessarily a reliably good judge, even if she affirms the correct decision procedure for judicial decision-making.

* * *

At this point, our short list of judicial virtues is almost complete. Surely there are many judicial virtues that we have neglected—"sensitivity," "kindness," "respectfulness," "sincerity or truthfulness," and perhaps "curiosity"—all of these may belong on the list. But there is one judicial virtue that cannot be omitted—at the cost of a distorted and incomplete account of judicial virtue. The missing virtue that is essential to the story is "justice."

b) The Virtue of Justice

An excellent judge is just; a judge who lacks the virtue of justice has a serious defect. At this level of abstraction, the virtue of justice is likely to be the object of widespread agreement. But what does the virtue of justice require? In this section, I will examine two different conceptions of the virtue of justice: *justice as lawfulness* and *justice as fairness*. (For short, I will use the phrases "the fairness conception" and "the lawfulness conception" to refer to these ideas.) I shall argue that conceptualizing the virtue of justice as fairness necessitates intractable disagreements about which judges are excellent, and that the competing conception, emphasizing the idea that excellent judges are lawful opens the door to agreement in judgments about who is just. My investigation begins with the fairness conception of the virtue of justice and then moves to the notion of justice as lawfulness.

(1) Justice as Fairness

One influential conception of the virtue of justice is begins with the premise that the just and the lawful are separate and distinct. Of course, the view is not that all laws are unjust or that no just norms are law. Rather, the idea is that there is no necessary connection between legality and justice.²⁹ If this were so, then the most plausible conception of the virtue of justice might be articulated as follows:

29. This conception of the virtue of justice bears an affinity to the separation thesis—a central tenet of legal positivism. Cf. H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) (discussing legal positivism and the separation thesis, but not in the context of the virtue of justice).

The Virtue of Justice as Fairness: A person, P, has the virtue of justice as fairness, V(j-f), if and only if P is disposed to act in accord with the best conception of fairness, F, in situations, S, where fairness provides salient reasons for action.

One might think that a judge who possessed *V(j-f)* would act solely on the basis of fairness³⁰ with reference to the law, but this is not the case. If this were true, it would provide the basis for a devastating objection to the fairness conception—because it would require each judge to substitute her private judgments about what fairness requires for the duly enacted constitutions, statutes, and rules. The just judge would entirely disregard the law. Although I shall not provide the argument here, it seems plain that this would be a recipe for chaos.³¹

But a defender of the fairness conception need not admit that a judge who acted on the basis of fairness would disregard the law entirely. *Why not?* Because the existence of legal norms will frequently give rise to considerations of fairness that will transform the moral landscape, creating salient reasons of fairness that motivate a judge who has *V(j-f)* to act in accord with the law. An example may help to clarify and illustrate this point. Suppose there is a dispute between Ben and Alice over Greenacre—a vacant and unimproved parcel of land. The law gives Ben title to Greenacre, which he has purchased, but Alice has begun to use Greenacre by planting a garden. In the absence of the institution of property law, it might be the case that Ben would have no claim on Greenacre—how would he acquire such a claim without some use or improvement of the land—but that given the existence of property law, Ben would have a claim of fairness, because he has paid for Greenacre and has reasonably relied on the legal institution of property. If this is so, then the law has created a claim of fairness that otherwise would not exist and a judge with *V(j-f)* would decide in favor of Ben—assuming, of course, that there were no other circumstances that created an overriding reason of fairness to decide in favor of Alice.

Nonetheless, the fairness conception faces a formidable objection because of the role that private judgment plays for judges with *V(j-f)*. To articulate this objection, we need to highlight the distinction between two questions about fairness—which I shall call “first order” and “second order” questions of

30. For our purposes, the content of fairness does not need to be specified. The content of fairness could be provided by consequentialist, deontological, or aretaic theories.

31. Of course, there may be some theorists who believe that judges do and should act on the basis of their sense of fairness rather than the law. Moreover, those who adhere to the radical or strong indeterminacy thesis contend that the law never constrains the choices of judges. See Lawrence B. Solum, “On the Indeterminacy Crisis: Critiquing Critical Dogma,” *University of Chicago Law Review* 54 (1987) 462.

fairness. A first order question of fairness is simply the question, “Which action is fair given the circumstances?” A second order question of fairness concerns whose judgment about first order questions will be taken as authoritative. Thus, the question, “Given the fact of disagreement about the correct answer to a first-order question of fairness, whose judgment should be taken as authoritative?” is a second order question of fairness. One possible answer to a second-order question of fairness is that one ought to rely on one’s own *private* judgment about what action is fair. A quite different answer is that one should rely on some source of *public* judgment. For example, one might rely on duly-enacted and public laws.

The fairness conception implicitly requires judges to exercise private judgment about first-order questions of fairness. In exercising that judgment, the judge may conclude that expectations generated by reasonable reliance on the law provide reasons of fairness—as in the case of Ben, Alice, and Greenacre—but this is a conclusion of private judgment. One judge might conclude that Ben’s reliance on property law was reasonable, and hence that fairness required a decision for Ben. A different judge might conclude that no one could reasonably rely on property law in cases in which they were allowing valuable land to lie fallow when others could make productive use of the land—and therefore decide for Alice. Yet a third judge might conclude that because of pervasive economic inequalities, the whole institution of property is unjust and award the land to a third-party, Carla, who was in greater need than either Ben or Alice. Because each judge makes a private judgment about the all-things-considered fairness of following the law in each case, these judgments can (and we expect will) differ with the moral, religious, and ideological views of the particular judge.

The objection to the fairness conception of the virtue of justice is that disagreements in private judgments about fairness would undermine the very great values that we associate with the rule of law. Because the fairness conception requires each judge to exercise her own private judgment about what fairness requires—all things considered—and because such judgments will frequently differ, the outcome of disputes adjudicated by judges with $V(j-f)$ will be systematically unpredictable. If this were the case, then the law would be unable to perform the function of coordinating behavior, creating stable expectations, and constraining arbitrary or self-interested actions by officials. How bad this would be is a matter of dispute. A Hobbesian answer to this question is *very bad indeed*—in the absence of coordinating authority, life would be “solitary, poore, nasty, brutish, and short.”³² A Lockean answer

32. Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: IN: Hackett, 1994), 76.

is that reliance on private judgment leads to “inconveniences,”³³ but even an optimistic realist would surely concede that the inconvenience of a society that cannot secure the rule of law would be serious.

One way to test the fairness conception of the virtue of justice is to consider its application to the questions, “Who are the good judges?” and “Who should we select as a judge?” If the fairness conception were correct, then the excellent judges are those who have the right beliefs about fairness and who are disposed to act on those beliefs. If we agreed on the content of the right beliefs about fairness, this would not be a problem, but we do not agree. So the fairness conception leads to disagreement about who has the virtue of justice. We can provide a crude translation of this point into the language of political ideologies of the left and right. For the left, only left-wing judges are just; because only left-wing judges have what the left considers true beliefs about what fairness requires. And of course, for the right, the left-wing judges are unjust precisely because they have what the right considers false beliefs about fairness. Even the uncontested virtues—such as incorruptibility or courage—become problematic once the fairness conception has been accepted. For the left, an intelligent, diligent, and courageous right wing judge may be worse than a judge who lacks a keen intellect, is somewhat lazy, and who will succumb to the pressures of public opinion. And vice versa for the right.

It gets worse for the fairness conception. Anyone who holds the fairness conception is naturally tempted to apply a double standard of judicial excellence. The double standard works like this:

For judges with whom I agree, the fairness conception supplies the content of the virtue of justice. Right-thinking judges are excellent when they act on the basis of their convictions about what is fair. But when it comes to judges with whom I disagree, a different standard applies. Wrong-thinking judges are excellent when they stick to the rules. For them, the lawfulness conception provides the standard for the virtue of justice.

You may say, “That’s ludicrous, no one could hold such a blatantly inconsistent set of positions about the meaning of justice.” In reply, I suggest that you pay careful attention to the political rhetoric that attends debates about judicial role and judicial selection.

33. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 276.

(2) Justice as Lawfulness

If the fairness conception of the virtue of justice is unsatisfactory, is there an alternative? In the *Nicomachean Ethics*, Aristotle suggests an alternative understanding of justice as lawfulness, but to understand Aristotle's view, we need to take a look at the Greek word *nomos* which is usually translated as "law." For the ancient Greeks, *nomos* had a broader meaning that does "law" in contemporary English. Richard Kraut, the distinguished Aristotle scholar, explained the difference as follows:

[W]hen [Aristotle] says that a just person, speaking in the broadest sense is *nomimos*, he is attributing to such a person a certain relationship to the laws, norms, and customs generally accepted by some existing community. Justice has to do not merely with the written enactments of a community's lawmakers, but with the wider set of norms that govern the members of that community. Similarly, the unjust person's character is expressed not only in his violations of the written code of laws, but more broadly in his transgression of the rules accepted by the society in which he lives.

There is another important way in which Aristotle's use of the term *nomos* differs from our word 'law': he makes a distinction between *nomoi* and what the Greeks of his time called *psēphismata*—conventionally translated as 'decrees'. A decree is a legal enactment addressed solely to present circumstances, and sets no precedent that applies to similar cases in the future. By contrast a *nomos* is meant to have general scope: it applies not only to cases at hand but to a general category of cases that can be expected to occur in the future.³⁴

We can restate this last point by using our distinction between types of judgments (first and second order, private and public). If judges rely on their own private, first-order judgments of fairness as the basis for the resolution of disputes, then it follows inexorably that their judgments will be decrees (*psēphismata*) and not decisions on the basis of a second order, public judgment—in other words, not on the basis of a *nomos*. In other words, a judge who decides on the basis of her own private judgments about which outcome is fair—all things considered—is making decisions that are tyrannical in Aristotle's sense.

"How can this be?" you may ask. "Aren't decisions that are motivated by fairness the very opposite of tyranny?" But framing the question in this way obscures rather than illuminates the point. Of course, if there were universal agreement (or even a strong consensus) of first-order private judgments about fairness, then decision on the basis of such judgments would be *nomoi* and not *psēphismata*. But our private, first-order judgments about the all-things-

34. Richard Kraut, *Aristotle* (Oxford: Oxford University Press, 2002), 105-06.

considered requirements of fairness do not agree. So in any given case, a decision that the judge believes is required by fairness will be seen by others quite differently. At best, the decision will be viewed as a good faith error of private judgment about fairness. More likely, those who disagree will describe the decision as a product of ideology, personal preference, or bias. At worst, the decision will be perceived as the product of arbitrary will or self interest. In no event, will a decision based on a controversial first order private judgment of fairness be viewed as outcome of a *nomos*—a publicly available legal norm.

Rule by decree (*psēphisma*) is tyranny. Decision on the basis of private, first-order judgments about fairness is the rule of individuals and not of law. From Aristotle's point of view, a regime that rules by decree does not provide the stability and certainty that is required for human communities to flourish.³⁵ Kraut continues:

We can now see why Aristotle thinks that justice in its broadest sense can be defined as lawfulness, and why he has such high regard for a lawful person. His definition embodies the assumption that every community requires the high degree of order that that comes from having a stable body of customs and norms, and a coherent legal code that is not altered frivolously and unpredictably. Justice in its broadest sense is the intellectual and emotional skill one needs in order to do one's part in brining it about that one's community possesses this stable system of rules and laws.³⁶

And with that point in place, we can now formulate the lawfulness conception of the virtue of justice:

The Virtue of Justice as Lawfulness: A person, P, has the virtue of justice as lawfulness, V(j-l), if and only if P is disposed to act in accord with the nomoi (positive laws and stable customs and norms), N, in situations, S, where the nomoi provide salient reasons for action.

On the lawfulness conception, the virtue of justice does not require action in conformity with one's private, first-order judgments of fairness. Justice as lawfulness is based on a second order judgment that judges (or more generally, citizens) should rely on public judgments. The content of the public judgments are the *nomoi*—the positive laws and shared norms of a given community. Someone with the virtue of justice is disposed to act on the basis of the *nomoi*. In other words, the lawfulness conception holds that the excellent judge is a *nomimos*, someone who grasps the importance of lawfulness and is

35. Ibid., 106.

36. Ibid., 106.

disposed to act on the basis of the laws and norms of her community. A judge who is *nomimos* cares about the laws and norms of her community. She is disposed to do that which is lawful, because she respects and internalizes the *nomoi* of her community.

Finally, we are now in a position to compare the fairness conception and the lawfulness conception. Which of these offers a more satisfactory conception of the virtue of justice? On the surface, it might appear that the fairness conception is more satisfactory—after all, who can deny that we ought to do what fairness requires—all things considered? Although there is much more to be said in a full account of these matters, the argument advanced here provides good reasons to doubt that the fairness conception can offer a satisfying account of the virtue of justice. A view of justice must take into account the distinctions between first and second order judgments and between public and private judgments. Once these distinctions are introduced, the need for second order agreement on a public standard of judgment becomes clear. The lawfulness conception of the virtue of justice answers to this need; the fairness conception does not.

c) A Virtue-Centered Theory of Judging

For the sake of simplicity and clarity, I shall formulate a virtue-centered theory of judging in the form of four definitions:³⁷

- *A judicial virtue* is a naturally possible disposition of mind or will that when present with the other judicial virtues reliably disposes its possessor to make just decisions. The judicial virtues include temperance, courage, good temper, intelligence, wisdom, and justice.
- *A virtuous judge* is a judge who possesses the judicial virtues
- *A virtuous decision* is a decision made by a virtuous judge acting from the judicial virtues in the circumstances relevant to the decision.
- *A lawful decision* is a decision that would be characteristically made by a virtuous judge in the circumstances relevant to the decision.³⁸ The phrase “legally correct” is synonymous with the phrase “lawful” in this context.

37. This definition has been offered in slightly different form in prior work. See, e.g., “Virtue Jurisprudence: A Virtue-Centered Theory of Judging,” *Metaphilosophy* 34 (2003) 178, reprinted in *Moral and Epistemic Virtues*, ed. Michael Brady and Duncan Prichard (Oxford: Blackwell, 2003).

38. The distinction between virtuous and correct decisions is introduced to distinguish between a fully virtuous decisions (made by a virtuous judge acting from the virtuous) from a merely correct decision (made for the wrong reasons). In order to be legally correct, a decision need only be the one that would have been made by a virtuous judge, it need not be made for the right reason. In order for a decision to be virtuous, it must be both correct and made for the right reasons.

Thus, the central normative thesis of a virtue-centered theory of judging is that judges ought to be virtuous and to make virtuous decisions. Judges who lack the virtues should aim to make lawful or legally correct decisions, although they may not be able to do this reliably given that they lack the virtues. Judges who lack the judicial virtues ought to develop them. Judges ought to be selected on the basis of their possession of (or potential for the acquisition of) the judicial virtues.

Reliable excellence in judging requires that the judge possess all of the judicial virtues (and the requisite knowledge and skill as well), but a virtue-centered theory places special emphasis on two virtues—practical wisdom and justice. An excellent judge must be both *phronimos* and *nomimos*.

C. Transition: From Virtue Jurisprudence to Natural Goodness

In this part, I've offered a sketch of the judicial virtues including a more textured account of the virtue of justice in the context of an aretaic theory of judging. That theory is offered as an illustration of the content of a larger view in normative legal theory, virtue jurisprudence. In the next part, we approach the virtue of justice from another angle—the relationship of the virtue of justice to the idea of natural goodness. That relationship raises foundational questions about the status of justice as a virtue. Is justice a natural virtue—a natural characteristic of well functioning humans? Or is justice an artificial virtue—an artifact of human culture that is “constructed” or “invented” by humans?

III. FROM NATURAL GOODNESS TO NATURAL JUSTICE

There is much to be said about the question whether goodness or justice are natural. A full discussion would properly be the subject of a long monograph or series of monographs, far exceeding the limitations on this Article. My approach will begin with the idea of “natural goodness,” as it has been developed by Philippa Foot³⁹ and Michael Thompson,⁴⁰ and then proceed to the application of those ideas to justice.

39. Philippa Foot, *Natural Goodness* (Oxford: Oxford University Press, 2003).

40. Michael Thompson, “The Representation of Life,” in *Virtues and Reasons*, ed. Rosalind Hursthouse, Gavin Lawrence, and Warren Quinn (Oxford: Clarendon Press, 1995), corrected version available at <http://www.pitt.edu/~mthompso/1LIFE.doc>; “The Living Individual and its Kind,” *Behavioral and Brain Sciences* 21 (1998) 591-92; “Apprehending Human Form,” *Modern Moral Philosophy*, ed. A. O’Hear, (Cambridge: Cambridge University Press, 2004), 47-74., available at <http://www.pitt.edu/~mthompso/ansco652.doc>; Michael Thompson, “Three Degrees of Natural Goodness,” <http://www.pitt.edu/~mthompso/three.doc>.

A. *Natural Goodness*

Is goodness natural? In the introduction, we glanced briefly at Hume's discussion of the derivation of "ought" from "is" and Moore's open question argument. Having set those arguments to the side, let us go straight for the affirmative case for the thesis that human flourishing is a natural good. This case is not my own—it is borrowed from the account offered by Philippa Foot in her book *Natural Goodness*.

One entry point into Foot's argument is this observation: "Judgements of goodness and badness can have, it seems, a special 'grammar' when the subject belongs to a living thing, whether plant, animal, or human being."⁴¹ A word of clarification here—when Foot uses the word "grammar," she means it in its Wittgensteinian sense:⁴² this is "conceptual grammar" or "depth grammar" and not the agreement of nouns with verbs. Michael Thompson's explanation of the distinctive grammar of statements about living creatures is particularly perspicuous:

"They have four legs," we say of cats or of cat-form; "They bloom in spring," we say of cherries or of cherry-form. "It has four legs," we say of this cat *hic et nunc*; "It bloomed last spring" we say of the cherry tree in the garden. The properties expressed by these predicates may be said to "characterize" the life forms cat and cherry respectively; we may say, by contrast, that they "hold of" the individual cat or cherry tree in question. The predicates may of course fail to hold of many individual bearers of the life forms they characterize; it may even, in suitable cases, fail to be true of most of them. Where the characterizing predicates do fail to hold -- where a cat has three legs or a cherry does not bloom -- we have natural defect, a failure of elementary "natural goodness." Thus judgments of goodness and defect make implicit reference to the species or life form that the individual bears.⁴³

Of course, we humans are not cats or cherries. Among our characteristics as a species are the following:

- Humans are social creatures.
- Humans use language.
- Humans engage in deliberative practical reasoning.

41. Foot, *supra*, note 39, 28.

42. See, e.g., Ludwig Wittgenstein, *Philosophical Investigations*, ed. G.E.M. Anscombe and R. Rhees, trans. G.E.M. Anscombe (Oxford: Blackwell, 1953), ¶¶ 371, 373; see also Anat Biletzki and Anat Matar, "Ludwig Wittgenstein," *Stanford Encyclopedia of Philosophy* (Summer 2005 Edition), ed. Edward N. Zalta, URL: <http://plato.stanford.edu/archives/sum2005/entries/wittgenstein/> (visited September 26, 2006).

43. Thompson, "Three Degrees," *supra*, note 40, 2.

As with cats, so with humans. Not all humans are social, language-using, or engage in practical deliberation, but these activities are characteristic of the species. Well-functioning humans have these characteristics; when an individual lacks these capacities, that individual lacks a form of natural goodness. There is much more to say about Foot and Thompson's position, but this very brief discussion is sufficient to give a lively sense of the line they have taken.

How does this view connect up with virtue ethics and virtue jurisprudence? Michael Thompson puts it this way: "[T]he traditional table of virtues provides an apt characterization of the *specifically human* form of practical rationality. . . . [C]onsiderations of justice, benevolence and prudence are among those a well-reasoning human being will act upon, even where they conflict with other objectives.⁴⁴" In other words, the virtues are natural for humans—they are characteristic of well-functioning humans as social, communicative, and rational beings. Human beings need the virtues to function well. Intemperate, stupid, foolish, cowardly, and bad tempered humans do not—characteristically—do well in life. Or to put the point from an Aristotelian perspective, the virtues are required for a flourishing human life, that is, for human happiness.

B. Natural Justice

And that brings us to justice. Is justice an aspect of natural goodness for humans? My discussion of this question will proceed in three steps. First, I shall lay out the intuitive idea—that justice is a natural virtue for rational social creatures. Second, I shall identify some problems with the intuitive idea. And third, I shall address the question, "In what sense is justice as lawfulness a natural virtue?"

1. The Intuitive Idea: Justice as a Natural Virtue for Language-Using Rational Social Creatures

Because humans are social creatures, they need to get along with one another in order to flourish. At a minimum getting along requires us to avoid injury and interference. Because we are vulnerable creatures, we can kill and injure one another. Because we engage in complex projects, interference can frustrate our aims. Beyond the minimum, both the satisfaction of basic needs and the completion of complex projects require cooperation. Complex cooperation is only possible with stable expectations about social practices such as promising and legal practices such as contracting. Social norms and

44. *Ibid.*, 5.

legal rules ground stable expectations and hence enable complex cooperation. And the virtue of justice—the internalization of social norms and legal rules—is required for all of this to work. Humans who lack the virtue of justice will interfere with the flourishing of others and undermine their own flourishing. I take it that these points are not controversial, because they rely on very “weak” (where “weak” means “uncontroversial”) premises. The instrumental value of justice for human flourishing is a well-established social fact, beyond serious argument.

Much more could be said about the function of justice, but if we can (tentatively) be satisfied with this very abstract sketch, we shall then be able to get to the thorny problems that appear near the surface of any attempt to naturalize justice.

2. Three Problems with Natural Justice

So what are the problems for a naturalistic account of justice? Let’s begin with what I shall call “the objection from artificiality.”

a) The First Problem for Natural Justice: The Objection from Artificiality

Is justice really a natural human excellence? One problem is that justice does not fit the pattern that Aristotle lays out for the other natural virtues. Courage is a disposition with respect to the morally neutral emotion of fear, as is good temper with respect to anger. The disposition to too much fear is cowardice; the disposition to too little fear is rashness. Courage is the disposition to fear that is proportionate to the circumstances. We can easily see how virtues like courage can be viewed as “natural”: although the moral virtues may require cultivation and education, they are natural capacities of the human animal. But justice does not fit this pattern. There is no morally neutral emotion that relates to justice as does fear to courage. Unlike the other moral virtues, justice does not seem to be a mean with respect to corresponding vices of deficiency and excess (as is courage with respect to rashness and cowardice).

This problem was famously explored by Bernard Williams in his essay, “Justice as a Virtue.” Williams suggests that the notion of a just action or outcome “is prior to that of a fair or just person. Such a person is one who is disposed to promote just distributions, look for them, stand by them, and so on.”⁴⁵ “The disposition of justice,” Williams continues, “will lead the just

45. Bernard Williams, “Justice as a Virtue,” in *Essays on Aristotle’s Ethics*, ed. Amélie Oksenberg Rorty (Berkeley, CA: University of California Press, 1980), 196-97.

person to resist unjust distributions—and to resist them *however they are motivated*.⁴⁶ On Williams's account, then, it might seem that some theory of fairness is prior to the virtue of justice. To be just, is to have the right views about fairness and to be disposed to act upon those views.

We can take this objection one step beyond Williams. Here is the way it might go. Having the right views about fairness—it could be argued—is to have the true, correct, or best theory of fairness. But theories of fairness—the argument continues—are not natural attributes of humans as members of the species. Theories of fairness are constructions (or inventions) of human reason. The capacity for reason and deliberation may be natural—so the argument goes—but the products of this capacity are artificial. So justice is artificial—just as other products of human reason (novels, the theory of natural selection, or automobiles) are artificial.

And this objection seems equally potent when applied to justice as fairness and justice as lawfulness. If justice is fairness, then the virtue of justice is the disposition to act in accord with some theory of fairness and that theory is a human artifact. If justice is lawfulness, then the virtue of justice is the disposition to act in accord with the positive laws and social norms of a particular human culture, and those laws and norms are human artifacts. In either case, justice is an artificial virtue.

The answer to this objection rests on a strategy of confession and avoidance. Confession first. Justice does not fit the pattern of the other moral virtues—it is not a mean with respect to a morally neutral emotion. And yes, positive laws and theories of fairness are human artifacts. So there is a sense in which the virtue of justice could be said to be an artificial virtue—its operation depends on the products of human reason and those products can sensibly be characterized as artifacts.

Now for the avoidance. Nonetheless, the virtue of justice is a natural virtue. A well functioning human is naturally *nomimos*. It is natural for humans to act in accord with the shared social norms and positive laws of their cultures. Of course, not all humans share this disposition to lawfulness. Some humans are outlaws—they prey on the lawful, usually in ways that are ultimately self injuring. But this is not different than any other natural quality of humans or other species. Not all larks can fly. Not all humans have normal intelligence. Moreover, the natural capacity for lawfulness will not develop in all possible humans circumstances. In conditions of extreme deprivation or in radically dysfunctional societies, many or most humans may never develop this natural capacity. But once again, the same is true for the other virtues—such as courage or good temper.

46. Ibid., 197 (emphasis in original).

My claim—that justice as the capacity for a disposition to lawfulness is natural—is, of course, an empirical claim about the human species. And like any empirical claim it can be contested on the basis of relevant evidence. In this case, it might be argued that observable human behavior in well-ordered human societies does not support the idea of a natural capacity for a disposition to lawfulness. Or it might be argued that biology (or evolutionary biology) demonstrates that there is no possible mechanism for such a capacity. In this essay, I shall put these issues to the side, and simply assume, for the sake of argument, that there is good evidence that humans have a natural capacity for lawfulness—or, in the alternative, that there is no decisive evidence against the existence of such a capacity.

One further qualification is in order. I am not claiming that “positive law” is natural in the same sense as is the virtue of justice as lawfulness. Constitutions, statutes, rules, regulations, and opinions—all of these are artifacts. Although positive law may be a “natural solution” to the inherent limitations on unwritten or customary social norms, this is not the same kind of naturalness that I claim for the virtue of justice itself. Moreover, the content of particular positive laws will be non-natural in the sense that a variety of different laws or legal regimes can be compatible with a well-ordered society of flourishing humans.

b) The Second Problem for Natural Justice: The Uneasy Relationship
between Lawfulness and Fairness

There is a second problem with the interpretation of natural justice as a virtue of lawfulness. If lawfulness is a virtue, then what do we say about fairness? This problem seems particularly acute given the strong association in contemporary moral and political theory between justice and fairness. Indeed, one important political philosopher, John Rawls, called his theory “justice as fairness.” And Aristotle recognizes a connection between justice as fairness—offering theories of both distributive and corrective justice (as fairness) in Book V of the *Nicomachean Ethics*. Even if justice is partially or even primarily a virtue of lawfulness, mustn’t it be the case that fairness enters into the picture in some way—supplementing or constraining lawfulness.

Moreover, there is another difficulty with justice as lawfulness. Viewed from the point of the lawmaker, it might be thought that “justice as lawfulness” fails to fulfill an important function of an account of justice. Shouldn’t our theory of justice tell us what the law should be? If the lawmaker wishes to know which laws are just, she doesn’t want to know which laws are lawful. She wants to know which laws are fair.

What can we say about the uneasy relationship between lawfulness and fairness? The first point that we should make is that justice does not need to do all the work in an aretaic theory of legislation. The end of law is not justice: it is human flourishing. More particularly, the aim of law should be to create the conditions for the development, sustenance, and exercise of human excellence. The idea that justice is the primary or sole criterion for good laws may have some currency for certain variants of deontological normative legal theory, but virtue jurisprudence need not (and should not) take this idea on board. Of course, justice is one of the virtues. So the law should aim at lawfulness—the very great values of the rule of law. And to the extent that fairness is part of the virtue of justice, legislation should aim at fairness as well.

So what is the role of fairness in the virtue of justice? Fairness is not the primary end of law, but it is a supplement to and constraint on the content of the laws. The idea of fairness as a supplement to lawfulness is taken up in connection with the third problem for natural justice, which immediately follows this discussion. The notion that fairness acts as a constraint on the proper content of both positive law and social norms is taken up in Part IV, "Conclusion: From the Natural Justice to Natural Law."

c) The Third Problem for Natural Justice: The Tension between
Particularism and Rules

Virtue ethics is famous for embracing "particularism"—the notion that judgments about particular cases take priority over abstract principles.⁴⁷ One way of understanding particularism is via the "priority of the particular." In a modest version, this slogan expresses the idea that our judgments about particular cases play a more powerful role in moral deliberation than do abstract principles and general rules. The strongest version of moral particularism might endorse the claim that general rules and principles should play no role in practical deliberation. In either case, particularism seems to bump against the virtue of justice as lawfulness. On the lawfulness conception, rules and principles seem to play an important role in moral deliberation: because virtuous humans are *nomimos*, they have internalized the *nomoi* and hence act on the basis of social norms and the positive law.

How can the lawfulness conception of justice be reconciled with particularism? We should begin with the observation that virtue ethics does not reduce morality to justice—justice is one virtue among many and it orders

47. See generally *Moral Particularism*, ed. B.W. Hooker and M. Little (Oxford: Oxford University Press, 2000).

only a subset of human interaction. This means that the lawfulness conception of justice has a much different notion of the role of rules than that associated with some forms of deontology.

But even if virtue jurisprudence embraces only modest particularism and even if the role of rules required by the fairness conception of justice is contained, a tension remains so long as virtue jurisprudence retains a central role for the virtue of practical wisdom or *phronesis*. This tension will not exist in every case, of course. In most cases in a well-ordered society, adherence to the law will be in accord with both justice as lawfulness and the judgments of the *phronimos*. Let me restate that a bit differently: ordinarily, the *phronimos* will see that the action in accord with a salient legal rule is best.

But even if we concede that in ordinary cases justice requires adherence to the law, the question remains whether there are extraordinary cases—cases in which the *phronimos* (e.g., a fully virtuous judge) would depart from the law.

Even if first order private judgment cannot do the work of filling in the content of a general conception of the virtue of justice, that does not necessarily imply that the judge's sense of fairness has no role to play. The positive law is cast in the form of abstract and general rules; such rules may lead to results that are unfair in those particular cases that do not fit the pattern contemplated by the formulation of the rule. If lawfulness were the whole story about the virtue of justice, then an excellent judge would apply the rule "come hell and high water" even if the rule led to consequences that were absurd or manifestly unjust. But this implication of the lawfulness conception seems odd and unsatisfactory. Another way of putting this concern is to distinguish between two styles of rule application, which I shall call "mechanical" and "sensitive."

Does the excellent judge apply the rules in a rigid and mechanical way? Or does a virtuous judge correct the rigidity of the lawfulness conception with equity? The classic discussion of these question provided by Aristotle in Book V, Chapter 10 of the *Nicomachean Ethics*:

What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is nonetheless right; because the error lies not in the law nor in the legislator but in the nature of the case; for the raw material of human behavior is essentially of this kind.⁴⁸

48. Aristotle, *NE*, 1137b9-1137b24.

This is the *locus classicus* for Aristotle's view of *epiēikeia*, which is usually translated as "equity," but can also be translated as "fair-mindedness." As Roger Shiner puts it: "Equity is the virtue shown by one particular kind of agent—a judge—when making practical judgments in the face of the limitations of one particular kind of practical rule—those hardened customs and written laws that constitute for some societies the institutionalized system of norms that is its legal system."⁴⁹

But there is a problem with supplementing the lawfulness conception of the virtue of justice with the notion of equity. Understanding the problem begins with the fact that the virtue of equity seems to require the exercise of first-order private judgments of fairness. Once such judgments are admitted to have trumping force—to have the power to override the second order judgment to rely on the public judgments embodied in the law, the question becomes how the role of private judgment can be constrained. Without constraint, private judgment threatens to swallow public judgment and we are on a slippery slope that threatens to transform the lawfulness conception into the fairness conception.

The trick is to constrain equity while preserving its corrective role. To put the point metaphorically, we need an account of equity that enables us to navigate the slope while providing sufficient traction to avoid slipping or sliding. An Aristotelian account of the virtue of equity gives us three points of traction. The first point of traction is provided by the distinction between the equitable correction of law's generality and the substitution of private first order judgments for the *nomoi*. Equity is not doing what the judge believes is fair when that conflicts with the law; rather, equity is doing what the spirit of the law requires, when the expression of the rule fails to capture its point or purpose in a particular factual context. The second point of traction is provided by the virtue of justice itself. A judge who is *nomimos* simply isn't tempted to use equity to avoid the constraining force of the law. A *nomimos* has internalized the normative force of the law; such a judge wants to do as the law requires.

The third point of traction is provided by Aristotle's understanding of the intellectual virtue of practical wisdom or *phronesis*—think of the quality that we describe as "good judgment" or "common sense."⁵⁰ A judge with virtue of practical wisdom, a *phronimos*, has the ability to perceive the salient features of particular situations. In the context of judging, we can use Llewellyn's

49. See Roger Shiner, "Aristotle's Theory of Equity," *Loyola Los Angeles Law Review* 27 (1994) 1245, 1260-61.

50. *NE*, 1139a3-8.

phrase, “situation sense,”⁵¹ or by way of analogy to the phrase “moral vision,”⁵² we can say that a sense of justice requires “legal vision,” the ability to size up a case and discern which aspects are legally important. The *phronimos* can do equity because she grasps the point of legal rules and discerns the legally and morally salient features of particular fact situations.

This account of equity can be contrasted with two rivals. On the one hand, we can imagine a conception of judging as pure equity—the idea that the judge would simply do the right thing in each particular fact situation. This conception of equity is simply a more particularistic version of the fairness conception of the virtue of justice. On the other hand, we can imagine a conception of judging that limits equity to the vanishing point—perhaps to those cases where the application of the rule is truly absurd. Neither of these two alternatives offers a fully satisfactory account of the virtue of equity. The first alternative sacrifices the very great goods created by the rule of law. The second alternative pays too a high price for those goods, require more rigidity than is necessary. A constrained practice of equity done by judges who are both *nomimos* and *phronimos* combines the values of the rule of law with the flexibility to bend the rules to fit the facts when that is required by the purposes of the rules themselves.

C. *In What Sense is Justice as Lawfulness Natural?*

We have examined the idea that natural justice can be understood on the model of natural goodness and that this idea can be given content by the lawfulness conception of the virtue of justice, suitably qualified by the complimentary idea that a fully virtuous judge is both *nomimos* and *phronimos*—and hence that justice as lawfulness can be tempered by the practice of equity. In what sense is this conception of the virtue of justice “natural”? A deep answer to this question would require an explication of the concepts of the natural and naturalness—but that enterprise cannot be undertaken on this occasion. The shallow answer to the question that was outlined above⁵³ was that the virtue of justice as fairness can be seen as a condition for the flourishing of humans and their communities. It might be argued, however, that the criteria for naturalness are provided by science in general and evolutionary biology in particular. So it might be argued that the naturalness of the virtue of justice as lawfulness can only be established by

51. Karl Llewellyn, *The Common Law Tradition* (Boston: Little Brown, 1960), 59-61, 121-57, 206-08.

52. See Nancy Sherman, *The Fabric of Character* (Oxford: Clarendon Press, 1989).

53. See *infra* Part III.B.1, “The Intuitive Idea: Justice as a Natural Virtue for Language-Using Rational Social Creatures.”

sociobiology—that is, by a showing that the disposition to internalize social norms is the product of human evolution and is, in some sense, “hard wired.” For the purposes of this essay, I shall simply put that argument to the side. I do not mean “natural” in that sense. My claim is that the virtue of justice as lawfulness is natural in an ordinary and pretheoretical sense of the term “natural.”

IV. CONCLUSION: FROM THE NATURAL JUSTICE TO NATURAL LAW

What is the relationship between natural justice and the natural law tradition? My remarks about these connections will be programmatic and sketchy, but they are informed by a particular conception of the perennial debate about natural law and positivism. Some legal theorists see the “What is law question?” through the lens of contemporary analytic legal philosophy. To those theorists, the debate between natural law and positivism is a debate about the concept of law; analytic philosophy and conceptual analysis provide the appropriate tools for determining the “essence” or “necessary conceptual content” of law. My conception of the debate between natural lawyers and legal positivists is quite different.

The question “What is law?” and the theoretical positions that are labeled as “natural law” and “legal positivism” can be understood in three related but distinct ways. First, we might follow contemporary academic practice and understand this debate as conceptual: how can the concept of law be analyzed and what are the necessary and sufficient conditions for its application? Second, we might understand the debate as empirical: in a particular social context, are the criteria for legal validity based exclusively on the sources or are there moral criteria for the validity of at least some legal rules? Third, we might understand the debate as essentially normative: should the complex social practice that we call law limit itself to source-based criteria for legal validity or should moral criteria play some role? Although these questions are distinct, they are related. For example, strong conceptual legal positivism might entail that the empirical and normative questions are “nonsense,” on the one hand, while the intelligibility of normative arguments for moral criteria for legal validity might cast doubt on the plausibility of strong conceptual claims about the strong separation of law and morals or what is called “exclusive legal positivism.”

With this understanding of the debate between natural lawyers and legal positivists in mind, let us turn to lawfulness conception of the virtue of justice. It might be argued that my account of natural justice is radically inconsistent with the natural law tradition. At the center of that tradition, the argument might go, is the idea that *unjust* laws are not *true* laws—*lex injusta non est lex*.

From this, it might be argued that the natural law tradition is committed to the fairness conception of the virtue of justice. That is, it might be thought that each human is obligated to act in accord with her own first-order private judgments of fairness. If this were so, it would not establish that the idea of a virtue jurisprudence or of a natural virtue of justice is inconsistent with the natural law tradition. Rather, it would establish that the versions of virtue jurisprudence that are compatible with the natural law tradition are ones that incorporate the fairness conception of the virtue of justice.

Nonetheless, I shall claim that a virtue jurisprudence that incorporates the lawfulness conception of the virtue of justice can be reconciled with the natural law tradition. There are two steps to this reconciliation. The first step focuses on the relationship between the social norms and positive law. The second step focuses on the relationship between the status of a norm as a *nomos* and the relationship of the norm to human flourishing.

The virtue of justice as lawfulness is a disposition to act lawfully—to internalize the *nomoi* the social and legal norms of a given human society. Up to this point, I haven't said much about the relationship between social norms and legal norms. There are at least three possible relationships that are relevant to the issue at hand:

- First, the content of a legal norm can be congruent with content of a social norm (or set of norms).
- Second, a legal norm can be supported by a social norm (or set of norms) that recognizes the legitimate authority of institutions with the power to create, modify, or extinguish legal rules.
- Third, a legal norm can be inconsistent with a social norm (or set of norms), either because of conflict between the content of the two norms or because the institutions that are the source of the legal norm lack legitimate authority given relevant social norms.

Each of these three relationships requires some explanation.

The first relationship is that the content of a legal norm can be congruent with content of a social norm (or set of norms). For example, the legal rule prohibiting and punishing murder is congruent with a social norm. Congruence is not the same as identity. The social norm may be vague or underspecified in comparison with the legal norm. For example, the social norm may sanction or require punishment for murder, but the legal norm may specify a particular punishment, such as imprisonment or execution. Congruence requires that the legal norm express the social norm in a way that enables the internalization of the social norm to provide direct support for the legal norm.

The second relationship is that a legal norm can be supported by a social norm (or set of norms) that recognizes the legitimate authority of institutions

with the power to create, modify, or extinguish legal rules. For example, it is possible that there would be no social norms that govern speed limits on the highway or the times that one may use a public park. If this were the case, these legal norms might nonetheless be internalized on the basis of a more general social norm that recognized the legitimate authority of the legislative body that promulgated the norm. Of course, the first and second relationships may coexist—that is, a given legal norm may have content that is congruent with the content of a social norm and also be supported by a social norm that grounds the legitimate authority of the source of the legal norm.

The third relationship obtains when a legal norm is inconsistent with social norms. That inconsistency can take one of two different forms. The first form of inconsistency is based on content. For example, if there were a legal norm that prohibited driving at more than 55 mph, but a social norm against driving less than 60 mph, the content of legal norm would be inconsistent with the content of the social norm. Likewise, if there were a legal norm authorizing arbitrary murder by the secret police, but a social norm against such murders, the two would be inconsistent. The second form of inconsistency is based on illegitimate authority. For example, if a coup or foreign invasion were to result in the institution of a government with coercive power but without legitimate authority, there could be a social norm that disapproved of the internalization of the content of laws issued by the government.

With these three relationships in mind, let's return to the natural-law-slogan, "an unjust law is not a true law." On the lawfulness interpretation of the virtue of justice, it might appear that this slogan expresses a very odd idea. If we substitute "unlawful" for "unjust," we get "an unlawful law is not a true law." Is the notion of an "unlawful law" an oxymoron? Not necessarily, that expression could refer to a statute that was not enacted through the processes prescribed by law or a statute that was inconsistent with the constitution. But this is not what natural lawyers mean by their slogan. There is, however, another way in which we can interpret the slogan, once we recall that the lawfulness conception of the virtue of justice is based on the *nomoi* rather than positive law. On this interpretation, the phrase "true law" refers to positive laws that stand in one of the two right relationships to social norms—either congruence or socially recognized legitimate authority. Positive laws that have content that is inconsistent with the content of social norms or that are promulgated by institutes that lack legitimate authority are not true laws.

There is another sense in which a virtue jurisprudence that embraces the lawfulness conception of the virtue of justice can incorporate the natural law slogan that an unjust law is not a true law. This sense derives from the notion that it is a condition for a norm to count as a *nomos* that the norm must be such that it could be internalized by any fully virtuous human. That is, the norm

must be internalizeable by any fully virtuous agent—in possession of the intellectual and moral virtues. For short, we can might say that for a norm to be a *nomos* it must be such that it could be embraced by the *phronimoi*—by those humans in full possession of the human excellences. Social norms or positive laws that clearly hinder rather than enable human flourishing could not be internalized by a fully virtuous agent who has grasped the *telos* or proper end that *nomoi* serve.

When these two restrictions on the content of law are conjoined, it becomes apparent that the lawfulness conception of the virtue of justice gives a distinctive interpretation of the natural law slogan that an unjust law is not a true law. First, a positive law that is inconsistent with social norms is not a *nomos*. Second, social norms and positive laws that could not be internalized by the *phronimoi* are not *nomoi*. The lawfulness conception of the virtue of justice entails that a fully virtuous agent is *nomimos*—disposed to act in accord with the *nomoi*. But a fully virtuous agent is not disposed to act in accord with social norms that would undermine human flourishing; nor is a fully virtuous agent disposed to act in accord with positive laws that have content that is inconsistent with social norms or that lack legitimate authority. In this sense, a fully virtuous agent with the virtue of justice as lawfulness will not be disposed to act in accord with unjust positive laws or social norms. From a virtue theoretic perspective, that is the cash value of the slogan, “an unjust law is not a true law.” The virtue jurisprudential version of the slogan is, “defective norms are not true *nomoi*.”

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Our investigation of natural justice has been expressed in three movements. From virtue ethics, we have developed the idea of virtue jurisprudence. From natural goodness, we have derived the notion of natural justice. And from natural justice, we have come around to natural law. Let me conclude with a confident but controversial assertion. This movement, from virtue ethics to a distinctive interpretation of the natural law tradition is no coincidence, no mere “happy accident.” Thinking about natural law is rooted in Aristotle’s ethics. There is a “natural” fit between natural law and natural justice—a match made explicit by the virtue of justice as lawfulness. In normative legal theory, it is virtue jurisprudence that can provide the best contemporary expression of the natural law thesis that there is an essential connection between law and justice.

